

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KIPTON FLEMING,)
)
Petitioner,)
)
vs.) Case Number CIV-05-690-C
)
EDWARD EVANS,)
)
Respondent.)

ORDER ADOPTING REPORT AND RECOMMENDATION

This 28 U.S.C. § 2254 action for habeas corpus relief, brought by a state prisoner proceeding pro se, was referred to United States Magistrate Judge Robert E. Bacharach, consistent with the provisions of 28 U.S.C. § 636(b)(1)(B). Judge Bacharach entered a Report and Recommendation on January 31, 2006, recommending the Petition be dismissed as untimely. Petitioner filed a timely objection, and the Court therefore considers the matter de novo.

The Magistrate Judge properly found Petitioner's complaint is untimely. Petitioner's judgment was final on August 12, 2003. Petitioner did not file the present action until June 17, 2005. Thus, the present motion was filed well outside the one-year limitations period established by 28 U.S.C. § 2244(d)(1). As noted by Judge Bacharach, Petitioner's argument that he was not aware of the factual predicate of his claim until July of 2004 is unsupportable. It is clear that Petitioner raised allegations relying on the same factual basis asserted here as early as 2002. Petitioner argues in his objection that his present claim raises a different legal theory than that pursued in 2002. This argument is of no avail. The question is not what

legal theories are pursued, but whether Petitioner was aware of the facts necessary to pursue his claim. Review of the evidence cited by the Magistrate Judge demonstrates he clearly was. Petitioner has offered no evidence or argument in his Objection demonstrating error in this finding.

As set forth more fully herein, Petitioner has failed to offer any basis to reject the Report and Recommendation of the Magistrate Judge. Accordingly, the Court adopts, in its entirety, the Report and Recommendation (Dkt. No. 31) of the Magistrate Judge. Respondent's Motion to Dismiss Remaining Fourth Claim for Relief as Time-Barred (Dkt. No. 12), which has been converted to a Motion for Summary Judgment, is GRANTED. The Court finds all claims time-barred (see Order, Dkt. No. 23). A judgment will enter accordingly.

IT IS SO ORDERED this 24th day of March, 2006.



ROBIN J. CAUTHRON
United States District Judge